infestation, the Secretary of Agriculture reported the matter to the United States attorney for the Western District of Missouri.

On March 4, 1931, the United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 10 boxes of evaporated apples at Kansas City, Mo., alleging that the article had been shipped by Claypool & Hazel from Springdale, Ark., on or about January 3(31), 1931, and had been transported from the State of Arkansas into the State of Missouri, and charging adulteration in violation of the food and drugs act. The article was labeled in part: "Morning Glory Brand Evaporated Apples, Packed by Claypool and Hazel Springdale, Ark."

It was alleged in the libel that the article was adulterated in that insufficiently evaporated apples had been mixed and packed with and substituted in part for the said article. Adulteration was alleged for the further reason that the article consisted in part of a filthy and putrid vegetable substance and was worm infested.

On April 30, 1931, no claimant having appeared for the property, judgment of the court was entered finding the product adulterated and ordering that it be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

18300. Alleged misbranding of corn bran. U. S. v. Shreveport Grain & Elevator Co. Demurrer and motion to quash filed by defendant. Demurrer sustained and case dismissed. (F. & D. No. 23742. I. S. Nos. 012352, 012353.)

The contents of certain sacks of corn bran from the shipment herein described having been weighed by a representative of this department and found to weigh less than the declared weight, namely, less than 100 pounds net, the Secretary of Agriculture reported the matter to the United States attorney for the Western District of Louisiana.

On July 23, 1929, the United States attorney filed in the United States District Court for the district aforesaid an information against the Shreveport Grain & Elevator Co., a corporation, Shreveport, La., charging shipment by said company, on or about January 5, 1929, in violation of the food and drugs act as amended, from the State of Louisiana into the State of Texas, of a quantity of corn bran which was alleged to be misbranded. The article was labeled in part: (Tag) "100 Lbs. (Net) Corn Bran Manufactured by The Shreveport Grain & Elevator Company, Shreveport, Louisiana."

The defendant filed a demurrer to the information and a motion to quash, attacking the section of the food and drugs act relied upon by the Government. On December 7, 1929, the United States attorney filed an amendment to the information.

Misbranding of the article was alleged in the information as amended for the reason that the statement, "100 Lbs. (Net)," borne on the tag attached to the sacks containing the article, was false and misleading in that the said statement represented that each of the said sacks contained 100 pounds net of the article, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that each of the said sacks contained 100 pounds net of the article, whereas some of the said sacks contained less than 85 pounds of the article, and the average net weight of the contents of all the sacks was less than 96 pounds. Misbranding was alleged for the further reason that the article was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the packages.

On October 25, 1929, the demurrer and motion to quash were argued by counsel for the Government and defendant and were submitted to the court on briefs. On February 21, 1930, the court handed down a decision, without opinion, sustaining the defendant's demurrer, and holding unconstitutional the section of the food and drugs act involved. The Government immediately filed a motion for a rehearing, which motion was granted on May 9, 1930. On May 28, 1930, the case was reargued and resubmitted to the court on the record and additional briefs. On September 16, 1930, the court handed down the following opinion sustaining defendant's demurrer and dismissing the information (Dawkins, *D. J.*):

"This is a criminal information, charging the defendant with misbranding certain corn bran, in violation of the pure food and drugs act of June 30, 1906 (34 Stat. 768 (21 U. S. C. A. Sections 1–5, 7–15)) in that each sack of said product was branded as containing 100 lbs net, whereas in truth they con-

tained a lesser quantity. By amendment it is charged that some of the sacks contained not more than 85 pounds net, and that the average was about 96 pounds.

"Defendant moved to quash the information on the ground that said act violates articles 1, 2, and 3 of the Federal Constitution because it attempts 'to grant legislative powers to the judiciary and to the executive departments of the Government;' and it violates the fifth amendment to the Constitution, in that it 'seeks to deprive of life, liberty, and property without due process of law,' as well as the fourteenth amendment, 'for the same reason;' and, further, that it violates the sixth amendment because 'it is too indefinite, sets up no ascertainable standard of guilt and defendant cannot be informed of the nature and cause of the accusation against it thereunder.'

"After declaring that sacks or packages containing articles of food shall have the net weight or measure plainly stamped thereon, the third paragraph of section 8 of the act, as amended (37 Stat. 732, 21 U. S. C. A. section 10, paragraph 3), provides as follows: 'Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title.'

"It must be remembered that this is a criminal action for the alleged violation of this statute, one of the very few that have been brought thereunder, and, while the proceeding is against a corporation, it might easily have been one charging an individual, who in default of payment of fine could be subjected to imprisonment. Hence a much stricter construction is required than if it were merely an act affecting civil rights. I have no doubt that Congress has the power, for the protection of the public, to require that packages containing articles of food shall have stamped thereon the correct weight or number, and that the dealer, without having any fraudulent or criminal purpose, may, in an extensive business, be unable to comply exactly in each instance with this requirement. However, in such circumstances, it would be a question of intent for the court and jury, if there was a variation, but the dealer would have a fixed standard by which to be guided, whereas under the quoted provision of the act, its violation, in large measure, is left either to the discretion of the enforcing department in making rules or regulations, or to the judgment of the court and jury in each instance as to what is reasonable. This might vary according to the views of the particular tribunal, and the dealer could never know whether he was violating the law or not until he was brought into court.

"For these reasons, I believe the asserted ground of unconstitutionality under the sixth amendment, is well founded. See U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; Connally v. General Const. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; Yu Cong Eng v. Trinidad, 271 U. S. 500, 46 S. Ct. 619, 70 L. Ed. 1059; U. S. v. Reese et al., 92 U. S. 214, 23 L. Ed. 563; U. S. v. Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. Ed. 190; Todd v. U. S., 158 U. S. 282, 15 S. Ct. 889, 39 L. Ed. 982.

"For the reasons assigned the demurrer or motion to dismiss will be sustained. Proper decree may be presented."

ARTHUR M. HYDE, *Secretary of Agriculture.*